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## YONG CHOO KIONG v. PP

COURT OF APPEAL, PUTRAJAYA
HADHARIAH SYED ISMAIL JCA
AZMAN ABDULLAH JCA
SM KOMATHY SUPPIAH JCA
B [CRIMINAL APPEAL NO: A-05(SH)-317-07-2022]
25 MARCH 2024

**Abstract** – *(i) The court has a discretion to invoke s. 265A of the Criminal Procedure Code to allow a witness to give their evidence anonymously; (ii) When a question arises as to the effect of any provision of the Federal Constitution in any proceeding before another court, the Federal Court has the jurisdiction to determine the question and remit the case to the other court to be disposed of in accordance with the determination; (iii) A trial judge could not be said to have failed to consider an accused's cautioned statement, merely because he makes no mention of the said statement, when in his deliberations he had pointed out all the substance contained in the said cautioned statement and analysed them.*

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***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused charged in High Court for offence of rape of domestic helper – Penal Code, s. 376 – Accused sentenced to 13 years imprisonment and two strokes of cane – Whether trial judge erred in invoking s. 265A of Criminal Procedure Code – Whether trial judge erred in accepting evidence of victim as credible and corroborated – Whether investigation shoddy and incomplete – Whether defence considered*

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***CRIMINAL PROCEDURE:*** *Witness – Anonymous evidence – Accused charged in High Court for offence of rape of domestic helper – High Court allowed witnesses to testify anonymously – Whether discretion of court – Whether prerequisites for anonymous testimony fulfilled – Whether accused's right to fair trial compromised – Whether there was misdirection committed by trial judge – Criminal Procedure Code, s. 265A*

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The appellant, a politician, was charged in the High Court for the offence of rape of his domestic helper ('PW15'), pursuant to s. 376 of the Penal Code. The incident was said to have occurred when there was no one at home but the appellant and PW15. The next day, PW15 left the appellant's house and was helped by a motorist ('PW16') who took her to the police station. At the close of the trial, the appellant was found guilty and convicted for the offence. He was sentenced to 13 years imprisonment and two strokes of the cane. Hence, the present appeal against the conviction and sentence on the

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grounds that (i) his right to a fair trial had been compromised due to the misdirection committed by the trial judge in invoking s. 265A of the Criminal Procedure Code ('CPC') to allow PW15 and PW16 to give their evidence anonymously. Additionally, the appellant submitted that s. 265A of the CPC was unconstitutional; (ii) the trial judge erred in accepting the evidence of PW15 as credible and corroborated; (iii) the investigation officer failed to investigate the appellant's version of facts and to carry out a thorough investigation; and (iv) the trial judge had breached s. 182A of the CPC in failing to consider the appellant's statements which were made under s. 112 of the CPC and in coming to the conclusion that the appellant's defence was an afterthought and a bare denial.

**Held (dismissing appeal on conviction; allowing appeal on sentence)**
**Per Azman Abdullah JCA (for the majority):**

**(1)** The invocation of s. 265A of the CPC was the discretionary power of the trial judge and he did not err in invoking the said provision for PW15 and PW16. The issue of the constitutionality of s. 265A of the CPC was never raised in the High Court. Article 128(2) of the Federal Constitution ('FC') conferred jurisdiction on the Federal Court to determine a question as to the effect of any provision of the FC. Therefore, in any proceeding before another court, whenever a question arises as to the effect of any provision of the FC, it is the Federal Court which shall have the jurisdiction, subject to any rules of court regulating the exercise of that jurisdiction to determine the question and remit the case to the other court to be disposed of in accordance with the determination. The appellant should follow the proper procedure for such issue to be referred for the determination of the Federal Court. *Ergo cadit quaestio*. (paras 19 & 21)

**(2)** The trial judge did not err in finding that PW15 was a credible witness. There had been a clear finding of facts made by the trial judge based on the hearing of the witnesses and considering all the evidence tendered. The trial judge was the one who had the audio and visual advantage to observe the demeanour of the witnesses and was hence clearly entitled to make findings with regard to the credibility of the witnesses. Even though there were several shortfalls and inconsistencies in the victim's evidence, there were no reasons for PW15 to make up her stories. Moreover, the trial judge had not only considered the evidence of PW15 but also other corroborative evidence in which there was an abundant of evidence from PW15 and corroborated evidence in the form of the medical report by PW5 and PW6. (paras 22 & 23)

**(3)** The investigation was satisfactory and the appellant was not prejudiced. The investigation was not shoddy and incomplete. (para 28)

**(4)** It was not disputed that the trial judge made no mention of the appellant's cautioned statement in his grounds of judgment. However, the trial judge had pointed out all the substance contained in the said cautioned statement and had analysed them. Therefore, it could not be said that the failure of the trial judge to mention the appellant's cautioned statement was fatal in the event that such cautioned statement added nothing further to the appellant's evidence that was given in court. Such failure did not vitiate the conviction. The trial judge had also not erred in finding that the appellant's defence was an afterthought and bare denial since all the evidence had been scrutinised. (paras 31, 33 & 36)

**(5)** There was no merit in the appeal on conviction. The conviction was safe and the decision of the High Court was affirmed. The terms of imprisonment was reduced from 13 years to eight years with two strokes of the cane. (paras 37 & 38)

**Per SM Komathy Suppiah JCA (dissenting):**

**(1)** Section 265A of the CPC was introduced to give the court the discretionary power to permit witnesses to give evidence anonymously in order to conceal their identities for their safety where this is considered necessary in the interests of justice, especially in cases involving organised crimes. An accused person in a criminal trial is entitled to confront his accused in order to cross-examine them and challenge their evidence. Being able to see the face of a witness is the most important factor in cross-examination. A protection order ought to be made only where the preconditions set out in s. 265A have been met. The mere fact a witness refused to testify and was reluctant to have his/her identity disclosed in the proceedings were *ipso facto* not sufficient to make this order. There must be credible evidence that showed that the witness' refusal to give evidence was based on a well-founded, real and genuine fear which justified the identity of the victim to be protected from disclosure to protect his/her safety. A clear case of necessity was not made out in the instant case. There was no evidence that PW15 had reasons to fear that her safety was in jeopardy since she was at the material time, under the care and custody of the Indonesian Embassy. Neither was there any evidence adduced that the appellant or someone on his behalf had threatened or approached her in any way. Moreover and crucially, her identity was already known to the appellant. As such, there was no basis for a protection order on the ground that the identity of the victim needed to remain anonymous in order to be protected from

disclosure for her safety. As for PW16, he was not even a material witness in the prosecution's narrative as all he did was to drive the victim to the police station when she told him of the rape. That being so, it was difficult to fathom why a protection order was necessary in his case. The trial judge was in error when he invoked s. 265A of the CPC to grant the protection order when the statutory prerequisites and the necessity for the order had not been made out. (paras 67, 69, 70 & 72)

**(2)** There were several shortfalls and inconsistencies in PW15's evidence. The court was far from satisfied that PW15's evidence was unusually convincing. As such, PW15's testimony alone was not sufficient without further corroborative evidence implicating the appellant to ground a conviction. The contradictions in PW15's evidence would have sufficed to create a reasonable doubt in the prosecution's case. The trial judge erred in finding that PW15 was unusually convincing and there was corroboration of her evidence. (paras 88, 95 & 96)

**(3)** The appellant's complaint that there was no proper investigation done by the investigating officer and that he had been prejudiced by the same was without substance. (para 97)

**(4)** The cases of *Prasit Punyang v PP* and *Sathya Vello v. PP* illustrated that the failure to consider a s. 112 statement by an accused person, even if it was consistent and in accord with the appellant's oral testimony in court, was a serious breach under s. 182A and could not be cured by the proviso to s. 92 of the Courts of Judicature Act 1964. This was a case that boiled down to PW15's word against the appellant's and the latter's versions raised grave doubts about the victim's allegation of rape. The appellant's conviction was unsafe and unsatisfactory. The appeal was allowed and the conviction and sentence against the appellant ought to be set aside. (paras 106 & 107)

**Case(s) referred to:**
*Ah Mee v. PP [1967] CLJU 3; [1967] 1 LNS 3 FC* ***(refd)***
*Aizz Amidie Aziz & Yang Lain lwn. PP [2021] 4 CLJ 496 HC* ***(refd)***
*Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC* ***(refd)***
*Gan Boon Aun v. PP [2016] 6 CLJ 647 FC* ***(refd)***
*Muniandy & Ors v. PP [1966] CLJU 110; [1966] 1 LNS 110 FC* ***(refd)***
*PP v. Emran Nasir [1986] CLJU 69; [1986] 1 LNS 69* ***(refd)***
*PP v. Mardai [1949] CLJU 65; [1949] 1 LNS 65 HC* ***(refd)***
*PP lwn. Mohamad Malek Ridhzuan Che Hassan [2013] 8 CLJ 359 CA* ***(refd)***
*Prasit Punyang v. PP [2014] 7 CLJ 392 CA* ***(refd)***
*R v. Davis [2008] UKHL 36* ***(refd)***
*Sathya Vello v. PP [2022] 5 CLJ 659 FC* ***(refd)***
*Shahrullah Abdul Rakeb v. PP [2011] CLJU 1721; [2011] 1 LNS 1721 CA* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act, s. 92
Criminal Procedure Code, ss. 112, 182A, 265A(1), (3)
Evidence Act 1950, s. 159
Federal Constitution, art. 128(2)
Penal Code, s. 376(b)

*For the appellant - Hisyam Teh Poh Teik, Rajpal Singh, Salim Bashir, Tiew Poh Nee, Low Wei Lon & Hannah Kam; M/s Hisyam Teh & Co & M/s Rajpal, Firah & Vishnu*
*For the respondent - Mohd Amril Johari & Mohd Fuad Abdul Aziz; AG's Chambers*

*[Editor's note: For the High Court judgment, please see PP lwn. Yong Choo Kiong [2022] 10 CLJ 103 (overruled in part).]*

*Reported by Lina E*

## JUDGMENT

**Azman Abdullah JCA (majority):**

### Introduction

**[1]** This appeal is against the decision of the High Court dated 27 July 2022 whereby the High Court had convicted the appellant/accused for an offence of rape of his domestic helper ("the victim") under s. 376 of the Penal Code. The appellant was sentenced to 13 years of imprisonment and two strokes of the cane. The appellant now appeals on conviction and sentence.

**[2]** We had, by majority decision, dismissed the appeal on conviction and allowed the appeal on sentence. We now provide our reasons for the decision.

### Prosecution's Case

**[3]** In short, the facts of the prosecution's case are that, the appellant who is a state assemblyman for the constituency of Tronoh, Perak and a member of the executive council of the Perak State Government had been accused for rape of his 23-year-old Indonesian maid. The victim testified that the appellant had non-consensual sex with her.

**[4]** According to the victim, the offence occurred on 7 July 2019 whereby the appellant had raped the victim when there was no one at home. The appellant's wife, DW2, was said to left the house with her son Brye in her Vellfire BVY 8858 to buy McDonald's at a drive through outlet that was about ten minutes away from their home. In her testimony, the victim stated that the incident happened around 8pm when she was upstairs ironing clothes. The appellant came into the room and closed the curtains before he pulled the victim's hand towards the bed and knocked her down. The victim tried to escape, but failed. The appellant continued to forcibly held both

victim's hands and took off her pants and panties before inserted his penis into her vagina for two to three minutes. The victim managed to run away when the appellant let go of her hands. She went into the toilet. The appellant followed her into the toilet and tried to kiss her but she managed to push him out and lock the door.

**[5]** When the victim continued with ironing after the incident, she stepped on something sticky which she believed was the appellant's semen. So, she went down and brought a mop and cleaned it. She then took the mop down to wash it. At that time, she noticed a McDonald's box in the dustbin.

**[6]** On 8 July 2021, the next day, the victim had asked the driver for appellant, SP7, to take SP15 to the embassy. However, SP7 refused as he needs to apply for leave. At around 10am, the victim then called the Indonesian Embassy and spoke to PW3. According to PW3, the victim informed her that she had been sexually abused by her employer. PW3 advised the victim to lodge a police report or find her way to the embassy. The victim then left the appellant's house and was helped by a motorist (PW16) who took her to the police station.

**[7]** The victim was taken to a hospital where she was first examined by PW6 and later by a gynaecologist, PW5. They found a freshly torn hymen and an abrasion on her vagina. PW5's opinion was that this was a recent penetrative injury by something which passed through the hymen and that injury was consistent with sexual intercourse. Apart from that, no any bruises or injuries found on the bodies of PW15, as confirmed by PW6.

**[8]** During the investigation, the police took possession of the clothes worn by the victim for DNA analysis and seized some items that were allegedly used during the rape. However, from the analysis, no semen or DNA of the appellant was found on the clothes, vagina and fingernails of the victim or on the other items seized.

**[9]** There was also evidence of CCTV footage from the Meru Desa guardhouse and also McDonald's. However, according to the police officer, PW19, there were discrepancies as regard the timing used in the CCTV systems in both places and the actual time *ie*, the CCTV recording at the Meru Desa guardhouse was ten minutes fast and seven minutes slow at McDonald's.

**Defence Case**

**[10]** The appellant elected to give evidence in which he denied the charge made against him. As submitted by the defence, the crux of the appellant's defence was as follows:

(i) he did not rape PW15 at all on 7 July 2019 around 8:15pm until 9:15pm;

A (ii) the appellant was not left alone with PW15 on 7 July 2019 around 8:15pm until 9:15pm;

(iii) he was together with PW22 and had a chat after they came back from Kuala Lumpur;

B (iv) when his wife, DW2, went out with their son to the McDonald's, PW22 was still at the appellant's house;

(v) PW22 was still there when the wife came back from the McDonald's;

(vi) PW22 only left the appellant's house around 9pm;

C (vii) the appellant was still wearing the same clothes after coming back from Kuala Lumpur, *ie*, a black or dark blue T-shirt and a pair of long trousers. Later, he went to have a shower and changed; and

(viii) at 9:30pm, he had sexual intercourse with DW2 at that night and they fell asleep after that. This was informed to PW23 by DW2 in a D WhatsApp message and her cautioned statement.

**[11]** The appellant alleged that the victim had fabricated the rape in order to return to Indonesia because she was unhappy working for the family and that there was collusion between the victim and PW16 to falsely frame him. In support of his defence, the appellant relied on his s. 112 statement (D107) E that was given to the police soon after his arrest. It was exculpatory in nature.

**[12]** The appellant's evidence was corroborated by the testimony of DW2 who said that she was sure PW22 was still around when she returned from McDonald's as she could hear them talking. According to DW2 also, she F saw the victim after coming back from McDonald's and the victim looked normal and was doing her duties as usual.

**The Trial Judge's Decision**

**[13]** The trial judge accepted the victim's testimony and convicted the appellant on the charge of rape. The elements of rape under s. 376(b) of the G Penal Code was held satisfied that the appellant had sexual intercourse with the victim and such intercourse was without her consent.

**[14]** The learned trial judge referred to the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145 in which it was held that "the H corroboration is normally required in a sexual offence as a matter of practice and prudence, not of law". Therefore, in arriving at his decision, the learned trial judge had examined the evidences before him, *ie*, the medical evidence and the Meru Desa CCTV footage. The learned trial judge also found that the victim is credible witness. He found that the footage showed that the appellant had the opportunity to rape the victim when he was alone for the I duration of about ten to 13 minutes at the time DW2 left for McDonald's.

**[15]** On the other hand, the learned trial judge had rejected the appellant's defence on the reason that such defence was an afterthought and bare denial. The learned trial judge also held that DW2 was an interested witness.

**Grounds Of Appeal**

**[16]** Before us, the appeal was argued mainly on the following grounds:

(i) the learned trial judge erred in invoking s. 265A of the CPC;

(ii) the learned trial judge erred in accepting the evidence of PW15 as credible and corroborated;

(iii) the learned trial judge erred when he did not direct his mind as to the investigation of PW23 that was shoddy and incomplete; and

(iv) the learned trial judge erred when he failed to consider the appellant's defence.

**Our Decision**

*Issue (i): The Learned Trial Judge Erred In Invoking Section 265A Of The CPC*

**[17]** It was the submission of the appellant that the appellant's right to a fair trial has been compromised due to the misdirection committed by the learned trial judge in invoking s. 265A of the CPC to allow SP15 and SP16 to give their evidence anonymously. It was argued that there is completely no necessity for s. 265A of the CPC to be invoked in the instant case to enable SP15 and SP16 to give their evidence in anonymity. In consequence of the wrongful invocation of s. 265A of the CPC for SP15 and SP16, the appellant's right to effectively cross-examine SP15 and SP16 had been unjustly diminished and/or hampered as neither himself nor his counsel has been able to form a complete observation of their demeanour in order to assess their credibility while they were giving evidence.

**[18]** It is first apposite that s. 265A of the CPC be stated in its entirety as follows:

> Special provisions relating to protected witness
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> 265A. (1) Notwithstanding s. 264, where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.
>
> (2) For the purpose of satisfying itself as to the need to protect the identity of the witness, the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.

A (3) If after such inquiry the Court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given in such a manner that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.

B (4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.

(5) The Court shall disallow any question by the accused or his counsel C to any other witness that would lead to the identification of the witness who has given his evidence under this section.

(6) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person and his counsel.

D (7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section.

**[19]** We have considered this matter and we are of the view that the invocation of s. 265A of the CPC is the discretionary power of the learned E trial judge. It is true that a witness's demeanour is important in assessing his or her credibility as decided in the case of *Shahrullah Abdul Rakeb v. PP* [2011] CLJU 1721; [2011] 1 LNS 1721; [2012] 4 MLJ 592 (which was cited by the appellant). But we have to remember, it is the duty of the court to evaluate on the credibility of the witness and not upon litigant. Therefore, for this F appeal, we find that the learned trial judge is not erred when he invoked s. 265A of the CPC for SP15 and SP16.

**[20]** We could not comment further on this as we have no grounds as to why the learned trial judge allowed such invocation but we believe that all matters have been considered. What we have only is the decision of the G learned trial judge in the notes of proceeding (refer to appeal record vol. 2 in encl. 6 at p. 108.pdf) which stated as follows:

Hasil siasatan atau inkuiri yang dijalankan pada 10 Jun 2021, saya berpendapat adanya keperluan untuk identiti kedua-dua saksi terlindung ini dilindungi sebagaimana kehendak seksyen 20(1)(a) dan (b) Akta Perlindungan 2009 dan seksyen 265A Kanun Acara Jenayah. H

**[21]** On the constitutionality issue of s. 265A of the CPC whereby the appellant prayed to this court for a declaration that s. 265A of the CPC is unconstitutional, this issue was never raised in the High Court. In this regard, we are guided by the decision of Federal Court in the case of *Gan Boon Aun* I *v. PP* [2016] 6 CLJ 647; [2016] 4 MLJ 265 which held that "it is plainly obvious that the Legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the constitution."

It has to be noted that by virtue of art. 128(2) of the Federal Constitution, it confers jurisdiction on the Federal Court to determine a question as to the effect of any provision of the constitution. Therefore, in any proceedings before another court, whenever a question arises as to the effect of any provision of the constitution, it is the Federal Court which shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination. The appellant should follow the proper procedure for such issue to be referred for the determination of the Federal Court. With that, *ergo cadit quaestio*.

*Issue (ii): The Learned Trial Judge Erred In Accepting The Evidence Of PW15 As Credible And Corroborated*

**[22]** We are of the considered opinion that the learned trial judge had not erred in his finding that PW15 is a credible witness. There has been clear finding of facts made by the learned trial judge based on the hearing of the witnesses and considering all the evidences tendered. We are of the view that the learned trial judge is the one who had the audio and visual advantage to observe the demeanour of the witnesses. Hence, he was clearly entitled to make findings with regard to the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown before us that the findings were perverse and against all available evidence. In the present case, we see no reason to disturb the finding of the learned trial judge.

**[23]** Even though there are several shortfalls and inconsistencies in the victim's evidence, we both still find that no reasons for PW15 to make up her stories. Moreover, in his finding, the learned trial judge had not only considered the evidence of PW15 but also other corroborative evidence in which we both also found that there was abundant of evidence from the victim herself and corroborated evidence in the form of medical report by SP5 and SP6.

**[24]** It is true that when there are two sets of evidence which contrary with each other on a fundamental matter, the material contradiction and discrepancies or omissions must be construed in favour of the accused. However, in this present appeal, we both find no material contradiction for us to accept the appellant's version.

**[25]** Same as what had been stated by the appellant, the victim, PW15 also said that DW2 had left the house with her son to go to the McDonald's. According to the victim, the rape happened after DW2 left the house. This fact was denied by the appellant in which he said that he was with PW22 until DW2 came back from the McDonald. However, from the finding of the learned trial judge, through a footage from the CCTV, it shows that PW22's

vehicle exits Meru Desa Park at 8:37:50pm while DW2's vehicle only exits Meru Desa Park at 8:48:37pm and returned at 9:01:18pm Therefore, there were about 13 minutes that both the appellant and the victim were left alone at the house. Within such time, it is possible that rape may happened to the victim. Besides, no other evidence from the appellant stated that his house was broken into or the victim had sexual intercourse with another man. Therefore, it is an inevitable conclusion that a freshly torn hymen and an abrasion on the victim's vagina was caused by the appellant as alleged by the victim.

*Issue (iii): The Learned Trial Judge Erred When He Did Not Direct His Mind As To The Investigation Of PW23 That Was Shoddy And Incomplete*

**[26]** We now turn to consider the investigations of PW23 as it was contended by the counsel that the appellant's right to a fair trial was compromised as a result of the investigating officer's failure to investigate the appellant's version of facts and to carry out a thorough investigation.

**[27]** The counsel for the appellant submitted that the investigating officer failed to investigate to whom the number 05-5497131 was registered when the victim contacted the embassy and the conduct of PW23 to seize the bedsheet on which the victim alleged she was raped for DNA analysis.

**[28]** However, we are unable to agree with the appellant that the investigation was shoddy and incomplete. We are satisfied that the investigation here was satisfactory and the appellant was not prejudiced. The points raised was not material to warrant our appellate interference.

*Issue (iv): The Learned Trial Judge Erred When He Failed To Consider The Appellant's Defence*

**[29]** The appellant raised two points under this heading. First, the trial judge had breached s. 182A of the CPC in failing to consider the appellant's statements which was made under s. 112 of the CPC. Second, the trial judge made a grave mistake in coming to his conclusion that the appellant's defence was an afterthought and a bare denial as it was consistent with his s. 112 statement and was amply corroborated by Mr Lee and DW2.

**[30]** It is not in dispute that the trial judge made no mention of it at all in his grounds of judgment. According to the counsel of the appellant, this constitutes a breach of s. 182A and this is a serious error warranting appellate intervention and cited numerous authorities in support of this proposition.

**[31]** We have considered this matter and we agree with the learned Deputy Public Prosecutor that although the learned trial judge made no mention to the appellant's cautioned statement, however, he had pointed out all the substance contained in that cautioned statement and had analysed them. This can be seen throughout his grounds of judgment which we ourselves also find that the appellant's cautioned statement (exh. D107), the defence during the

prosecution's case, the witness statement (exh. PS-SD1) and the appellant's evidence at the defence stage are all the same in which they highlight the same narratives. Thus, it cannot be said that the failure of the learned trial judge to mention to the appellant's cautioned statement was fatal in the event that such cautioned statement added nothing further to the appellant's evidence that was given in court. It is our considered opinion that such failure also did not vitiate the conviction.

**[32]** We are guided by a decision of the Federal Court in *Sathya Vello v. PP* [2022] 5 CLJ 659; [2022] 4 MLJ 111 which held as follows:

> There was no merit to the appellant's contention that the trial judge had failed to consider all the evidence in breach of s 182A of the CPC. Although the trial judge had not considered the appellant's cautioned statement, it was in substance similar to the appellant's evidence in court. Hence, the mere omission to refer to the cautioned statement in the judgment was not fatal and did not vitiate the conviction as the cautioned statement added nothing further to the accused's evidence in court. The cautioned statement was a self-serving exculpatory statement which the appellant regurgitated at the trial by way of evidence under oath but which evidence the trial judge rejected for lacking in credibility. As for the complaint that DW2's evidence was not considered, it was not such a serious omission as to vitiate the appellant's conviction. The court failed to see how DW2's evidence that she had lodged a police report against Ganesan and Nanthini and had provided the police with their photographs and telephone numbers could have cast a reasonable doubt on the prosecution's case that the large amount of drugs that were in the appellant's possession was for the purpose of trafficking (see paras. 108, 111-112 & 116-117).

**[33]** From the grounds of judgment by the learned trial judge, it is clear that he had considered the appellant's defences prior before he made the finding of *prima facie* case at the end of the prosecution's case. We find that the learned trial judge not only considered the facts that are mentioned in the appellant's cautioned statement *ie*, he did not rape the victim, he was with his wife DW2 and PW22 was also present at the house, but also the new defence put forward *ie*, no DNA of the appellant found and the abrasion was caused by the victim's own action (masturbation).

**[34]** We now turn to the appellant's submission that the learned trial judge was wrong in holding that the appellant's defence was an afterthought and bare denial. We find from the grounds of judgment by the learned trial judge that when he made finding that the defence was afterthought, he did consider all evidence before him. The learned trial judge found that the defence was afterthought because of the failure of defence counsel to put its case through cross-examination of PW22. It is true that the appellant had stated his version of events at a very early stage *ie*, in his cautioned statement, but to prove his defence that he was with PW22 at the time the offence was alleged to be committed, such facts should be asked to PW22, so that PW22 can confirmed that.

**[35]** The defence that was found to be afterthought by the learned trial judge was on the allegation by the appellant that there was a political manoeuvre designed to bring the appellant's down by his political enemies. Thus, the appellant contended that there was a conspiracy between SP15, SP16 and his political enemies. The defence was based on the police report made by YB Dato Ngeh Koo Ham who said that SP16 who took SP15 to the police station was pointed with a gun and given money amounting to RM100,000. However, this contention was denied by SP16. SP16 has testified that no one had pointed a gun or gave monies to him.

**[36]** Therefore, we find that the learned trial judge had not erred in his finding that the appellant's defence was afterthought and bare denial since all the evidence had been scrutinised.

**Conclusion**

**[37]** Based on the aforesaid reasons, we find no merit in the appellant's appeal on conviction. The conviction was safe and the decision of the High Court is affirmed. We dismiss the appeal on conviction. Appeal on conviction is dismissed by majority.

**[38]** With regard to the appellant's appeal on sentence, in the circumstances of the case and having regard to the sentencing trends, we unanimously allow the appeal on sentence. We reduce the terms of imprisonment from 13 years to eight years with two strokes of the cane.

**SM Komathy Suppiah JCA (dissenting):**

**Introduction**

**[39]** The appellant was convicted of an offence of rape of his domestic helper ("the victim") under s. 376 of the Penal Code and sentenced to 13 years imprisonment and two strokes of the cane in the High Court on the following charge.

> Bahawa kamu pada 7 Julai 2019 di antara jam lebih kurang 8.15 malam hingga 9.15 malam, di dalam sebuah bilik di tingkat atas dalam rumah No. 52, Jalan Desa Meru 2, Meru Desa Park, Bandar Meru Raya, 30020 Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan rogol terhadap Awang (No. Paspot: AU359249) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 376(1) Kanun Keseksaan.

**[40]** He has appealed against his conviction and sentence. The majority of this court has decided to dismiss the present appeal by the appellant against his conviction. I find myself unable to agree with the majority view. These are the reasons for my dissent.

**Prosecution's Case**

**[41]** The appellant is a state assemblyman for the constituency of Tronoh, Perak and a member of the executive council of the Perak State Government. He is married to DW2 and they have four children, daughters Celine and Eunice and sons Brian and Byrce. In 2019, the family lived in a five-bedroom double-storey house in Meru Desa Park, Ipoh, a gated community that had a guardhouse equipped with CCTV.

**[42]** The victim is a 23-year-old Indonesian maid. She began her employment with the appellant's family as a domestic helper in May 2019.

**[43]** On the morning of 7 July 2019, the appellant and DW2 made a day trip to Kuala Lumpur to send off daughter Eunice who was studying there. They were driven to Kuala Lumpur by one Mr Lee, a family friend (PW22) in his Toyota Alphard bearing the car plate number PLV 8383. Bryce, the youngest child, stayed home with the victim. They returned to the appellant's home in Ipoh sometime after 8pm that day. Mr Lee did not leave straightaway but stayed on to have a chat with the appellant for some time in the backyard of the house. At some point thereafter, DW2 left the house with Bryce in her Vellfire BVY 8858 to buy dinner at McDonald's at a drive through outlet that was about ten minutes away from their home. The victim behaved normally when DW2 returned, and DW2 did not notice anything amiss. The victim continued with her chores.

**[44]** It was the case for the prosecution that Mr Lee had left the house before DW2 left for McDonald's and that the appellant had raped the victim during this time when there was no one at home.

**[45]** The next morning at around 11am, the victim telephoned the Indonesian embassy and spoke to PW3. The victim had called the embassy in Kuala Lumpur from a landline 05-5497131. This was not the phone number of the appellant's home. According to PW3, the victim informed her that she had been sexually abused by her employer and that she advised the victim to lodge a police report or find her way to the embassy. The victim then packed her clothes and left the employer's house and waved down a motorist (PW16) who took her to the police station in Ipoh to lodge a report.

**[46]** The victim was taken to hospital where she was first examined by PW6 and later by a gynaecologist, PW5. They found a freshly torn hymen and an abrasion on her private part. PW5's opinion was that this was a recent penetrative injury by something which passed through the hymen and that injury was consistent with sexual intercourse. Significantly, there were no bruises or injuries on the victim's body.

**[47]** The police took possession of the clothes worn by the victim for DNA analysis. They also seized some items that were allegedly used during the rape from the appellant's house. No semen or DNA of the appellant was found on the clothes, vagina and fingernails of the victim or on the other items seized from the appellant's home in the course of investigations.

**[48]** Police officer, PW19 took possession of CCTV footage from the Meru Desa guardhouse and also McDonald's. PW19 explained that there were discrepancies as regard the timing used in the CCTV systems in both places and the actual time. According to him, the CCTV recording at the Meru Desa guardhouse was ten minutes fast and seven minutes slow at McDonald's. It was plainly obvious from the Meru Desa CCTV footage that Mr Lee had indeed left the house before DW2 went to McDonald's.

**Victim's Testimony**

**[49]** The victim's testimony was as follows. Around 8pm she was upstairs ironing clothes in Brian's room when DW2 came to inquire if she had eaten. Soon after DW2 had left, the appellant came to the room holding the pants that he had worn to Kuala Lumpur. The appellant closed the curtains and pulled her towards the bed and then knocked her down and tried to be on top of her, she tried to escape, but was unsuccessful. The appellant held both her hands forcibly and then with one hand took off her pants and panties and inserted his penis into her vagina. He was in her for two to three minutes. When the appellant let go of her hands, she ran away by pushing him and went into the toilet. He followed her into the toilet and tried to kiss her but she managed to push him out and lock the door. The appellant knocked on the door several times and then left.

**[50]** Continuing with her testimony, the victim stated that after calming down and washing her vagina, she came out of the toilet to continue ironing but stepped on something sticky on the floor which she believed was the appellant's semen. She went down and brought a mop and cleaned it, and then took the mop down to wash it. At this time, she saw Bryce washing his hands after having had his dinner. She noticed a McDonald's box in the dustbin.

**[51]** Under cross-examination, she maintained the appellant had non-consensual sex with her and that she was sure that there was penile penetration as she "sudah nikah" at the time.

**Defence Case**

**[52]** The appellant elected to give evidence. He denied the charge made against him. The appellant contended that he did not commit the offence because he was never alone with the victim on the night of the alleged rape. According to him, Mr Lee left around 9pm. He then went into the house and

saw DW2 and son having their dinner in the kitchen. The appellant stated that he was then still wearing the same clothes he had worn to Kuala Lumpur, *ie*, a black or blue t-shirt and a pair of long trousers.

**[53]** The appellant testified that he then went up to have his shower and changed. At 9.30pm he made love to his wife and they went to sleep. The appellant alleged that the victim had fabricated the rape in order to return to Indonesia because she was unhappy working for the family and that there was collusion between the victim and the motorist PW16 to falsely frame him. In support of his defence, the appellant relied on his s. 112 statement (D107) that was given to the police soon after his arrest. It was exculpatory in nature.

**[54]** The appellant's evidence was corroborated by the testimony of DW2 who said that she was sure Mr Lee was still around when she returned from McDonald's as she could hear him and the appellant talking. DW2 stated that she saw the victim after coming back from McDonald's and the latter looked normal and was doing her duties as usual.

**The Trial Judge's Decision**

**[55]** The trial judge accepted the victim's testimony and convicted the appellant on the charge of rape. He determined that the medical evidence and the Meru Desa CCTV footage supported the victim's version of events and rejected the appellant's defence. He found the victim to be a credible witness and that she had remained cogent and firm in all material aspects of her story throughout rigorous cross-examination by the defence counsel. He found her evidence to be unusually convincing as to overcome any doubts that might arise from the lack of corroboration.

**[56]** By way of contrast, the trial judge had serious doubts about the credibility of the appellant and DW2 and found their evidence demolished by the CCTV footage. He found that the footage showed that the appellant had the opportunity to rape the victim as he was alone with the victim for about ten to 13 minutes when DW2 and Bryce left for McDonald's. He further found that the appellant's allegation of rape was a ploy to return home could not be believed as the evidence showed that the victim had no reason to be unhappy as she was treated well by the family and was even allowed to use the house phone to call her mother.

**Grounds Of Appeal**

**[57]** Before us, the appeal was argued on four main grounds:

(i) the appellant was prejudiced by the wrong invocation of s. 265A of the CPC by the trial judge;

(ii) the trial judge failed to judicially appreciate or evaluate the evidence of the victim;

A (iii) that the trial judge failed to appreciate that the investigation of PW23 was shoddy and incomplete; and

(iv) the trial judge failed to give due consideration to the defence of the appellant.

B **[58]** I will deal with these issues *seriatim*.

**Ground 1: Protection Order Under Section 265A CPC**

**[59]** The first ground of appeal has to do with the validity of a witness protection order granted by the trial judge on 23 June 2021 pursuant to s. 265A of the CPC. This requires a little narration. On the application of C the prosecution, the trial judge had conducted an inquiry on 10 June 2021 as required by sub-ss. (2) and (3) of s. 265A. Following the inquiry, he granted the protection order to allow the victim and PW16 to give their evidence in anonymity. PW16 was the witness who gave the victim a lift to the police station the day following the alleged rape. As a consequence of the D order, both the victim and PW16 gave evidence from behind a screen under the cover of anonymity and the appellant and his counsel were unable to see their faces.

**[60]** It is submitted by the counsel for the appellant that the granting of the E protection order was wrong in law and contrary to principle as the trial failed to consider the following facts before granting the order:

(i) that the issue of anonymity does not arise because the identity of the victim was already known to the appellant as at the material time she was working as a maid for the appellant's family;

F (ii) that the identity of PW16 was also disclosed by the prosecution in open court as "Hanif bin Mohamad Wahab" when they sought protection under the Witness Protection Act 2009; and

(iii) that there was no evidence adduced that the victim and PW16 were at the material time under a genuine fear for their safety if their identities G were revealed.

**[61]** It is further argued that the trial has been rendered unfair by the erroneous invocation of s. 265A by the trial judge which had unjustly curtailed the appellant's counsel's right to cross-examine his accuser and H PW16 effectively by observing their demeanour and by looking at their faces. It is submitted that as there is a strong connection between the ability to see the face of a witness and a fair trial, it is essential that any protection order granted must first fulfil the prerequisites of s. 265A. In support of this submission, counsel relied on decisions from United Kingdom, Australia and Canada. It would suffice to refer to one of them.

I

**[62]** This is the decision of the House of Lords in *R v. Davis* [2008] UKHL 36. The appellant had been convicted of murdering two men by shooting them at a party. He was identified as the murderer by three witnesses who had been permitted to give evidence anonymously, from behind screens, because they had refused, out of fear, to testify should their identities be disclosed. It was submitted on behalf of the appellant that this procedure was contrary both to the common law right of a defendant to be confronted by his accusers and art. 6(3)(d) of the European Convention On Human Rights. Both limbs of this argument were accepted unanimously by the House and it quashed the appellant's conviction for murder and remitted his case back to the court of appeal, to decide whether to order a retrial. Lord Carswell explained:

> I agree with the view expressed by the Court of Appeal ... that court would regard it as acceptable to allow a conviction to be based on the testimony of a witness given in the circumstances of the present case, if that were the sole or decisive evidence against the accused. That concept of the sole or decisive evidence has been regularly repeated in the jurisprudence of the court, I consider that the principle is more universal and that it could and should be applied to the anonymising of evidence in criminal trials in this jurisdiction.
>
> It is possible to distil some propositions from this review: (a) There is a presumption in favour of open justice and confrontation of a defendant by his accuser, (b) It is possible in principle to allow departures from the basic rule of open justice to some extent, but a clear case of necessity should be made out. (c) The court should be sufficiently satisfied that the witness's reluctance to give evidence in the ordinary manner is genuine and that the extent of his or her fear justifies a degree of anonymity, (d) Anonymising expedients may include the withholding of the witness's name and address, screening of the witness from the defendant and the public, screening from the defendant's legal advisers, disguising of the witness's voice from the defendant and the public and disguising of the voice from the legal advisers, (e) The more of these expedients the court might consider adopting, the stronger the case must be for invading the principle of open justice. Determination of the question depends upon balancing to ensure that the trial continues to be fair, (f) An important consideration is the relative importance of the witness's testimony in the prosecution case. If it constitutes the sole or decisive evidence against the defendant, anonymising which prevents or unduly hinders the defendant and his advisers from taking steps to undermine the credit of the witness is most likely to operate unfairly ... Courts trying criminal cases should not be over- ready to resort to such measures, and I would commend to them the words of the Court of Appeal (in the context of reading statements) in *R v. Arnold* [2004] EWCA Crim 1293, para 30 cited in *R v. Sellick* [2005] 1 WLR 3257, 3277, para 55:
>
> > We cannot leave this case without sounding a word of caution. The reference in *Luca v. Italy* to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning Mafia-type organisations is echoed

A across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this court concerned with the conduct of criminal trials is likewise. Inevitably, applications under s. 23 will follow but this judgment should not be read as a licence for prosecutors. Very great care must be taken in each and every
B case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well, depending on the
C circumstances, jeopardise infringing the defendant's article 6(3)(d) rights; even where it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.

**[63]** In response, the learned Deputy Public Prosecutor denied that the
D appellant was deprived of justice and a fair trial as the victim and PW16 had been present at the trial to give their evidence and the appellant was given the right to cross-examine them. It is his submission that the fact that the appellant and his counsel were unable to see the victim did not infringe on the appellant's right to a fair trial as s. 265A permits it where a witness is reluctant to testify in court for fear of his or her safety. The learned Deputy
E denied that the protection order had undermined the fairness of the trial as the trial judge was able to see the faces of the two witnesses to assess their credibility.

**Whether Trial Judge Correct In Granting The Protection Order**

F **[64]** I turn now to consider the rival submissions. It will be helpful, if I set out s. 265A in its entirety:

265A. Special provisions relating to protected witness

(1) Notwithstanding s. 264, where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and
G wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.

(2) For the purpose of satisfying itself as to the need to protect the
H identity of the witness, the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.

(3) If after such inquiry the Court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given
I in such a manner that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.

(4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.

(5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.

(6) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person and his counsel.

(7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section.

**[65]** Section 265A of the CPC enables the prosecution to apply to the court for a protection order where a witness seeks anonymity and refuses to testify in court for fear of his or her safety if his identity is revealed. See *Aizz Amidie Aziz & Yang Lain lwn. PP* [2021] 4 CLJ 496. In order to ascertain the legislative purpose behind s. 265A, it will be useful to consider the parliamentary debate when the provision was debated in the Parliament. The then *de facto* Law Minister had stated (as recorded in the Hansard dated 17 May 2016):

Fasal 7 bertujuan untuk memasukkan seksyen baru 265A, 265B dan 265C. Seksyen baru ini mengadakan peruntukan bagI keterangan saksi yang dilindungi diambil melalui tatacara khas. Pindaan ini dicadangkan bagi menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbang keselamatan dirinya jika identitinya didedahkan terutamanya dalam kes-kes yang melibatkan kumpulan jenayah terancang. Dengan peruntukan baru yang dicadangkan itu akan lebih ramai saksi berani untuk tampil memberikan keterangan terhadap apa-apa pertuduhan di mahkamah termasukiah terhadap anggota kumpulan jenayah terancang dan dengan keterangan itu, maka sabitan dapat dikenakan terhadap mereka yang melakukan jenayah.

**[66]** This same is repeated in the explanatory note to the CPC (Amendment) Bill 2016:

Fasal 7 bertujuan untuk memasukkan seksyen baru 265a, 265b dan 265c ke dalam Akta 593. Seksyen baru itu mengadakan peruntukan bagi keterangan saksi yang dilindung diambil melalui tatacara khas. Pindaan ini dicadangkan bagi menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbangkan keselamatan dirinya jika identitinya didedahkan.

**[67]** It is clear from the foregoing passages that s. 265A was introduced to give the court the discretionary power to permit witnesses to give evidence anonymously in order to conceal their identities for their safety where this is considered necessary in the interests of justice especially in cases involving organized crime. An accused person in a criminal trial is entitled to confront

A his accuser in order that he may cross-examine them and challenge their evidence. Being able to see the face of a witness is the most important factor in cross-examination. As such, in my view, this discretion ought to be very sparingly exercised and with great caution to ensure that a fair hearing is achieved. It follows that a protection order ought to be made only where the
B preconditions set out in s. 265A have been met. A protection order in favour of an undercover agent would be appropriate as this may be necessary for his own and his family's protection and others because of genuine fear on the part of the witness of retaliation by or on behalf of the accused.

**[68]** The preconditions under s. 265A that must be met before the
C jurisdiction to make a witness protection or anonymity order arises are;

> (a) that the order is necessary to protect the safety of the witness; and
>
> (b) and is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that (a) it is important that the witness should testify, and (b) and the witness's refusal to give evidence
D is based on a genuine fear and the witness would not testify if the order were not made.

**[69]** In my judgment, that the mere fact a witness refuses to testify and is reluctant to have his identity disclosed in the proceedings are *ipso facto* not
E sufficient to make this order. There must be credible evidence that shows that the witness's refusal to give evidence is based on a well-founded, real and a genuine fear which justifies the identity of the victim to be protected from disclosure to protect his or her safety.

**[70]** Coming back to the instant case, I am not persuaded that a clear case
F of necessity was made out. There is no evidence that the victim had reason to fear that her safety was in jeopardy, since she was at the material time in the care and protective custody of the Indonesian Embassy. Neither was there any evidence adduced that the appellant or someone on his behalf had threatened or approached her in any way. Moreover, and crucially, her identity was already known to the appellant. As such, there was no basis for
G a protection order on the ground that the identity of the victim needed to remain anonymous in order to be protected from disclosure for her safety.

**[71]** As for PW16, clearly, he was not even a material witness in the prosecution's narrative as all that he did was to drive the victim to the police
H station when she told him of the rape. That being so, it is difficult to fathom why a protection order was necessary in his case. There was evidence led by the prosecution fact that a DAP politician had made a police report that PW16 had driven the victim to the police station as PW16 had been threatened by someone at gun point and was paid RM100,000,00. PW16 had
I lodged a report denying all the allegations in the aforesaid report. In my view, the report by the DAP politician does not constitute a reasonable ground for PW16 to fear that his safety was in danger.

**[72]** For these reasons, I accept the appellant's submission that the trial judge was in error when he invoked s. 265A of the CPC to grant the protection order when the statutory prerequisites and the necessity for the order had not been made out. In the result, I am inclined to quash the appellant's conviction for rape.

**[73]** In the event, if I am wrong on this issue, I proceed to address the remaining three grounds raised by the appellant to challenge his conviction.

**Ground 2: Appreciation Of Victim's Evidence**

**[74]** The next ground of appeal deals with the victim's credibility. The trial judge as mentioned earlier had found the victim's evidence to be unusually convincing and was supported by the medical evidence, and the testimonies of PW3 and PW16.

**[75]** This is essentially an appeal against the findings of fact made by the trial judge. He was entrusted with the task of evaluating the conflicting evidence of the victim and the appellant in respect of the alleged incident of rape. In this instance, his findings of fact were largely based on his assessment of the credibility of the respective witnesses. At the conclusion of the trial, he accepted the evidence of the victim and rejected the defence's version of events.

**[76]** Given that this appeal largely involves the evaluation of the trial judge's finding of facts below, it is apposite that we remind ourselves of an appellate court's role with respect to the finding of facts made in the course of a trial. The appellate court's power of review with respect to finding of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned. However, this rule is not immutable. Where it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate court can and should overturn any such finding. In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts.

**[77]** Particularly, in sexual offence cases, experience has shown that people who allege that they have been raped, sometimes, and for various reasons, create false stories. Such allegations are easy to make and frequently very difficult to refute even by a person who is entirely innocent. See *PP lwn. Mohamad Malek Ridhzuan Che Hassan* [2013] 8 CLJ 359 and *PP v. Emran Nasir* [1986] 1 CLJU 69; [1986] 1 LNS 69.

**[78]** In *PP v. Mardai* [1949] CLJU 65; [1949] 1 LNS 65; [1950] MLJ 33, Spenser-Wilkinson J, expressed the view that in cases of sexual offences, it is unsafe to convict where there is no independent evidence. He said at p. 33:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless, it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story. It would be sufficient, in my view, if that corroboration consisted only of a subsequent complaint by the complainant herself provided that the statement implicated the accused and was made at the first reasonable opportunity after the commission of the offence.

**[79]** The trial judge in the instant case found the victim to be unusually convincing as she was unshaken in cross-examination. He further found that in any event, her evidence was corroborated by the medical evidence and that of PW3 and PW16.

**[80]** It is the contention of the appellant's counsel that the trial judge accorded excessive weight to the victim's evidence and wrongly accepted her evidence as credible and compelling. It is said he failed to consider that there were material contradictions and inconsistencies in her evidence. The counsel submitted that in view of the discrepancies and contradictions, the trial judge should not have accepted any part of the victim's evidence unless there was corroboration from independent and extrinsic sources.

**[81]** In response, the learned Deputy submitted that there was no basis to disturb the findings of fact made by the trial judge that the victim was unusually convincing. The victim had no reason to falsely implicate the appellant unless the incident had occurred. He further argued that the fact that the appellant's semen was not found in the victim's private part or anywhere else for that matter and the victim had no bruises or injuries on her body does not necessarily mean that the rape did not take place. The medical evidence indicated penetration to the vagina by a blunt object which must have been the appellant's penis. The Deputy further submitted that the victim's failure to inform DW2 and the appellant's driver of the rape should not be held against her as it is not inherently improbable that the victim would have felt that their loyalty was to the appellant and they would not have believed her.

**[82]** Having scrutinised the victim's evidence, I find several material inconsistencies and discrepancies on several issues. First, the victim's behaviour immediately after the alleged rape bore no resemblance to the conduct of a genuine rape victim. According to her, after she had cleaned herself in the bathroom, she wanted to continue with the ironing but stepped on something which she thought was semen on the floor of the bedroom. Knowing that the appellant could be downstairs, and could rape her again, she went downstairs to take the mop to clean the floor and then took the mop down again to wash it. Her suspiciously calm conduct especially in erasing

the evidence of sexual intercourse as if nothing had happened was difficult to fathom. One would expect her to be traumatised and in a state of shock or in distress after the rape, and not continue with her household chores in a cool, collected and indifferent manner.

**[83]** Second, the victim's allegation that the appellant was aggressive and had forcefully held her hands when he raped her, was not consistent with the medical evidence, which did not show any injuries on the body. One would expect to find some injuries on her body if her account was true.

**[84]** Next, and crucially there are two pieces of contemporaneous evidence that are inconsistent with the victim's allegation of rape. The first is the evidence that PW3 had made a report (P9) after the victim had phoned her. In this police report, PW3 clearly stated that the victim had only complained of sexual harassment by her employer. The second piece is the evidence of PW12 (the witness from the maid agency) who had lodged a report (P10) the same day to the effect that he was contacted by the Indonesian Embassy that the victim had complained that "dia telah diberi layanan yang tidak adil daripada majikannya." The allegation took a wholly different complexion and morphed into rape and only surfaced several hours later that day when the victim was taken to the police station by PW16. There was no explanation proffered for the two totally inconsistent versions given by the victim. There is a world of difference between sexual harassment, not being well treated by the employer and rape by the employer. One would expect a rape victim to allege rape in no uncertain terms.

**[85]** Thirdly, the victim alleged she had called PW3 from the appellant's house to report the rape after getting the embassy number from the telephone book, but PW3 testified the call had come from a landline OS-5497 131, which was not the appellant's house telephone number. The victim claimed she did not know anyone at the time to seek help. It begs the question where did the victim call from and why was she not telling the truth on an issue like this. Or are there hidden or unseen hands behind this episode. The prosecution could have easily traced the identity of the owner of the landline number.

**[86]** Fourthly, the absence of the appellant's semen and the appellant's DNA appears on any of the items that was seized, including the mop was not consistent with the victim's version of the facts. The forensic witness PW14 under cross-examination accepted that that even if the mop had been washed, semen stains could still remain on the mop.

**[87]** Lastly, the victim alleged that the appellant had taken the opportunity to rape when DW2 had gone to McDonald's and there was no one at home. I find it incredulous that the appellant would have been so desperate and reckless to run the huge risk of being caught for raping the victim by committing the alleged offence knowing that his wife and son could return

home at any time from McDonald's especially since McDonald's was only ten to 13 minutes' drive away from his home. And, more importantly, knowing there was a high likelihood that the victim would report the rape to DW2 on seeing her and cry to her for help.

**[88]** On the whole, it is clear to me that there are several shortfalls and inconsistencies in the victim's evidence. With respect to the learned judge, I am far from satisfied that the victim's evidence is "unusually convincing". There are glaring inconsistencies in the victim's evidence, some more material than others. As such her testimony alone was not sufficient, without further corroborative evidence implicating the appellant to ground a conviction.

**[89]** I turn now to consider the corroborative evidence that the trial judge had relied on to call for the defence. First, the medical evidence. The trial judge was satisfied that the medical evidence corroborated the victim's allegation of rape. It is true that the medical evidence showed a fresh tear in her hymen and an abrasion, but this *ipso facto*, does not indicate that the victim was raped. PW5 and PW6, the doctors who examined the victim, agreed under cross-examination that there were other possible causes like masturbation or self-pleasure with the finger, for the tear in the victim's hymen besides sexual intercourse, *ie*, that injuries were also consistent with consensual sex and masturbation. Both PW5 and PW6 could not conclusively testify that the tear and abrasion were because of penile penetration. That being so, it could not be said that the medical evidence afforded corroboration of the victim's story of a sexual assault.

**[90]** Next, I turn to consider the victim's complaints to PW3 and PW16. The trial judge held that her complaints to them was corroboration of the victim's evidence. Section 159 of the Evidence Act states:

> In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

**[91]** Section 159 allows as corroboration any former statements made by a witness to buttress the witness's credibility by showing that his or testimony in court is consistent with his or her previous statement. It is instructive in this regard to refer to the judgment of the Federal Court in *Ah Mee v. PP* [1967] CLJU 3; [1967] 1 LNS 3; [1967] 1 MLJ 220 wherein Ong Hock Thye FJ explained:

> With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence: see *Clynes* (1960) 44 Cr App R 158161. Consistency is not such corroboration and s. 157 of the Evidence Ordinance should be read in the light of my exegesis thereof in the case of *Mohamed Ali* [1962] MLJ 230 231, which I quote:

> It will not be out of place here to say a few words about s. 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R v. Baskerville* [1916] 2 KB 658; 12 Cr App R 81. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from "corroboration" as it appears in s. 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

**[92]** I accept that by reason of s. 159 of the Evidence Act, the victim's complaint to PW3 and PW16 and the lodging of the police report are technically corroboration of the victim's evidence. However, it is clear from *Ah Mee v. PP* that these are not corroboration by independent evidence as all complaints had originated from the victim. In my view, if the victim's evidence is not unusually convincing, it is difficult to fathom how the fact that the victim had repeated it several times can add much weight to it. It is imperative to note that at the first opportunity the victim had not complained of rape but of sexual harassment and of not being treated well by her employer.

**[93]** In my view, her complaints to PW3 and PW16 and the lodging of the police report is suspect and have little additional evidential value. Corroboration by virtue of s. 159 alone is not corroboration by independent evidence. In the present case, it is noteworthy that there is absolutely no *Baskerville* type of corroboration, *ie*, that the corroborating evidence must be independent and must conform in a material particular that the accused, committed the offence.

**[94]** The learned trial judge held that he was persuaded that the victim was unusually convincing as she was unshaken in cross-examination. It is instructive in this regard to refer to the case of *Muniandy & Ors v. PP* [1966] CLJU 110; [1966] 1 LNS 110; [1966] 1 MLJ 257, where the Federal Court explained:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime

A consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

**[95]** In my judgment, the discrepancies within the victim's testimony, as well as the contradictions raised several serious doubts as to the veracity of
B the allegation made by her. In finding her to be unusually convincing, the trial judge resolved almost every ambiguity in the evidence in the victim's favour and ignored the glaring inconsistencies and discrepancies in her evidence. The contradictions in her evidence would have sufficed to create a reasonable doubt in the case for the prosecution.

C **[96]** I therefore conclude that the trial judge erred in finding that the victim was unusually convincing and there was corroboration of her evidence.

**Ground 3: Shoddy Investigation**

**[97]** Next, it is the appellant's contention that there was no proper
D investigation done by the investigating officer and he has been prejudiced by the same. I find this complaint to be without substance.

**Ground 4: Evaluation Of The Defence Evidence**

**[98]** The trial judge did not accept the appellant defence that he had no
E opportunity to rape the victim as he found that Mr Lim had left the appellant's home before DW2 left for McDonald's. He made this finding based on the CCTV footage. He further found the defence of the appellant to be an afterthought and a bare denial.

**[99]** The appellant raised two points under this heading. First, the trial
F judge had breached s. 182A of the CPC in failing to consider the appellant's s. 112 statement to the police. Second, the trial judge made a grave mistake in coming to his conclusion that the appellant's defence was an afterthought and a bare denial as it was consistent with his s. 112 statement and was amply corroborated by Mr Lee and DW2.

G **[100]** As regards s. 182A of the CPC, it is common ground that this section mandates the trial judge to consider all the evidence adduced before him in deciding whether the prosecution has proved its case beyond reasonable doubt. As stated earlier, the appellant had provided a s. 112 statement to the police soon after his arrest which was consistent with his oral evidence in
H court. It is not in dispute that the trial judge made no mention of the appellant's s. 112 statement at all in his grounds of judgment. The counsel contended that constitutes a breach of s. 182A and this is a serious error warranting appellate intervention and cited numerous authorities in support of this proposition.

I

**[101]** In answer, the learned Deputy submitted that although the trial judge had not considered the appellant's s. 112 statement, he pointed out that it was in substance similar to the appellant's evidence in court. Hence, the omission to refer to the s. 112 statement in the judgment was not fatal and did not vitiate the conviction as the statement added nothing further to the appellant's evidence that was given in court. It was argued that the appellant was not prejudiced by the non-consideration of his s. 112 statement.

**[102]** In my view, the prosecution's contention is contrary to the decision of this court in *Prasit Punyang v. PP* [2014] 7 CLJ 392; [2014] 4 MLJ 282 and a recent decision of the Federal Court on review in *Sathya Vello v. PP* [2022] 5 CLJ 659. In both these cases, the cautioned statement of the accused was similar, if not identical to the oral evidence given in court. In *Prasit Punyang*, it was observed:

> In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which the learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt ... The learned JC must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The appellants cautioned statement was recorded a day after the arrest of the appellant. It is important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him ... The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant has to be kept in mind in coming to the conclusion as to the guilt of the appellant. .... the learned JC had failed to adequately direct his mind as to the truth of the appellants version as stated the cautioned statement. ... We are of the view that at the conclusion of the trial, the learned JC should have properly addressed his mind in connection with the cautioned statement of the appellant in deciding whether the prosecution has proved its case beyond reasonable doubt. ... The fact that the defence is not a recent fabrication is supported by the contents of the appellants cautioned statement which is substantively similar to his defence advanced ...It was then the duty of the learned JC to consider the defence of the appellant in the light of the cautioned statement that he had given to the police a day after he was arrested. On the facts of the present case, the failure on the part of the learned JC to consider and evaluate the appellants cautioned statement constituted a serious non-direction which amounts to a misdirection, warranting appellate intervention. Such a misdirection is an appealable error.

**[103]** The aforesaid decision was subsequently affirmed by the Federal Court.

**[104]** In *Sathya Vello v. PP*, a similar complaint was taken by the defence that the trial judge had failed to consider the appellant's cautioned statement, and the appellant's sister's evidence. The Federal Court set aside the conviction

on the ground that a breach of s. 182A is fatal and cannot be cured by the proviso to s. 92 of the Courts of Judicature Act. The *ex-tempore* judgment is reproduced:

> A long line of cases has established that the proviso to s. 92(1) of the CJA is utilised with care and circumspection in rare cases. The majority of case law however does not support the legal position that the proviso may be utilized to circumvent a breach of Section 182A of the CPC where such breach has occasioned a miscarriage of justice. This latter element will turn on the fact of each particular case. In the instant case, having examined the facts, we are of the unanimous view that the non-consideration of the accused cautioned statement and his sister's evidence has occasioned material prejudice resulting to miscarriage of justice. This is therefore not a fit case to apply proviso under Section 92(1) of the CJA. Even if we invoke Section 37(d) of the DDA, such that the sister's evidence is also considered, it is probable on a balance of evidence would have rebutted presumption of knowledge. Accordingly, we find merit on the appeal. On the totality of the evidence, we find the conviction unsafe, we therefore allowed the appeal, we set aside the conviction and sentenced, the appellant is acquitted and discharged.

**[105]** In my view, the two cases discussed in the preceding paragraphs illustrate that the failure to consider a s. 112 statement made by an accused person, even if it is consistent and in accord with the appellant's oral testimony in court, is a serious breach under s. 182A and cannot be cured by the proviso to s. 92 of the Courts of Judicature Act.

**[106]** In view of the position I take on the failure of the trial judge to consider the appellant's s. 112 statement, I do not find it necessary to consider the defence complaint, that the trial judge was wrong in holding that the appellant's defence's was an afterthought and bare denial, save and except to say that I accept the trial judge's finding that Mr Lee had left the appellant's home before DW2 left for McDonald's. This, however, does not mean that the appellant had raped the victim. This is a case that boiled down to the victim's word against the appellant's and the latter's versions raise grave doubts about the victim's allegation of rape.

**Conclusion**

**[107]** For the reasons given, I am of the view that the appellant's conviction is unsafe and unsatisfactory. I am therefore minded to allow the appeal and set aside the conviction and sentence against the appellant.